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U-5201

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

SECOND APPEAL NO. 08 /2006 Single Bench

APPELLANT (PLAINTIFF)

Paulus Tigga, S/o. Shiril Tigga, Aged about 68 years, Occupation Agriculturist, Caste-Uraon, R/o. Village Gudlu, Badupara, Tahsil Bagicha, District Jashpur (C.G.)

VERSUS

RESPONDENTS (DEFENDANTS)

S/R 1. Xaxarios Ekka, S/o.Tyofil Ekka, Aged about 49 years, Caste- Uraon, Occupation-Service, R/o. Village Gudlu, Badupara, Tahsil Bagicha, District Jashpur (C.G.) Presently R/o. Village Kunkuri, Near Loyola Get, District Jashpur (C.G.)

P.R. No. 12/06
Presented by Shri Rajesh Akle
Dated 06/1/06

S/R 2. Filamon Ekka, S/o. Late Tyofil Uraon, Aged about 46 years, Occupation Agriculture.

6.1.06

S/R 3. Mikhail Ekka, S/o. Late Tyofil Uraon, Aged about 36 years, Occupation Agriculture.

S/R 4. Ku. Vina Kumodani Ekka, D/o. Late Tyofil Uraon, Aged about 39 years.

RS 5. Ku. Korneliya Ekka, D/o. Late Tyofil Uraon, Aged about 32 years.

RS 6. Mu. Silina (Buko Bek,) Wd/o. Tyofil Uraon, Aged about 75 years.

All are caste Uraon, Occupation Agriculture, Resident of village Badupara, Gudlu, Tahsil Bagicha, District Jashpur (C.G.)

7. State of Chhattisgarh,
Through the Collector, Jaspur Nagar,
District Jashpur (C.G.)

APPEAL U/S. 100 OF THE CODE OF CIVIL PROCEDURE

First Appeal valued at Rs. 885/-

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Second Appeal No. 08 of 2006

Paulus Tigga

Vs.

Xaxarios Ekka and six others

Post for Judgment: 12.02.2007

Sd/-
Dilip Raosaheb Deshmukh
Judge

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Before: Hon'ble Shri Justice Dilip Raosaheb Deshmukh

Second Appeal No.08/2006

Paulus Tigga

Vs.

Xaxarios Ekka and six others

Shri Kishore Bhaduri, Advocate with Shri Roop Naik, Counsel for the appellant/plaintiff

Shri J.K.Shahstri, Counsel for respondents No.1 to 6.

Shri Akhil Agrawal, P.L. for the State/respondent No.7

J U D G M E N T

(Delivered on this 12th day of February 2007)

Being aggrieved by the judgment and decree passed in Civil Appeal No. 40-A of 2005 on 08.11.2005 by Shri G.C.Bajpai, District Judge, Jashpur, reversing the judgment and decree for specific performance of contract granted by Civil Judge Class-II, Jashpur passed in Civil Suit No. 19-A of 2003 on 30.11.2004 the appellant/plaintiff has preferred this Second Appeal.

2. The appellant-plaintiff filed a suit for specific performance of contract against the respondents/defendants No.1 to 6 on the ground that father of the defendants No.1 to 5 and husband of defendant No.6 late Tyofil Ekka had, on 10.09.1980 agreed to sell 0.25 acre of land, out of Kh. No. 125 area 1.38 acres (hereinafter referred to as

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the suit land) situated in village Gudlu, Patwari Halka No.34, revenue circle and Tahsil Bagicha, District Jashpur for a sum of Rs.300/- and had executed *Ekrarnama* Ex.P.1. The plaintiff had constructed a residential house and *Badi* over the suit land and was in possession thereof. During his lifetime, Tyofil Ekka did not, in any manner, interfere with the possession of the plaintiff over the suit land. After executing the *Ekrarnama* on 10.09.1980, Tyofil Ekka borrowed additional sums of Rs.150/- on 4.6.1982, Rs.20/- on 25.03.1984, Rs.15/- on 25.08.1984, Rs.50/- on 16.05.1990 and Rs.30/- on 15.01.1995 (Total Rs.585/-) from the plaintiff. Since Tyofil Ekka did not return the loan advanced, the plaintiff included the aforesaid sums as consideration of the suit land. In this manner, the entire consideration of Rs.885/- was paid by the appellant/plaintiff to Tyofil Ekka On death of Tyofil Ekka, the defendants started causing disturbance in the plaintiff's possession over the suit lands and were threatening to dispossess him. It was further pleaded by the plaintiff that upon demarcation being got done by the Patwari in presence of Tyofil Ekka, the suit land was found to measure to 0.48 acre in place of 0.25 acre. Since the plaintiff was in adverse possession of the suit land since 1980, he claimed a relief of a declaration of his title and possession over the suit land and also for specific performance of the agreement dated 10.09.1980 praying that the defendants be directed to execute a sale-deed of 0.48 acre of land in favour of the plaintiff. It was further prayed that the defendants be restrained by permanent injunction from interfering with the possession of the plaintiff.

3. The defendants resisted the suit and denied the plaintiff's case *in toto*. It was pleaded that the plaintiff was never in possession of

the suit land and was not entitled to a decree for specific performance of contract since readiness and willingness to perform his part of the contract, if any, was neither pleaded, nor pleaded.

4. The learned Civil Judge Class-II, Jashpurnagar while recording evidence exhibited *Ekrarnama* as Ex.P.1 without impounding the same. No objection was raised by the defendants in this regard. It rejected the plaintiff's prayer for specific performance of contract for sale of 0.48 acre land and held that the plaintiff was entitled for specific performance of contract only to the extent of 0.25 acre land, as mentioned in the *Ekrarnama* Ex.P.1. It also recorded a finding that since time was not the essence of the contract and Tyofil had gone away for earning his livelihood, after his death cause of action arose in favour of the plaintiff when the name of defendants was mutated over the suit lands. On these premises, it granted a decree for specific performance of contract to sell suit land i.e. 0.25 acre only in favour of the plaintiff and restrained the defendants from interfering with the possession of the plaintiff over the suit land.

5. Being aggrieved, the defendants preferred Civil Appeal No.40-A of 2005. The learned District Judge, Jashpur recorded findings that the *Ekrarnama* Ex.P.1 was a document which was not sufficiently stamped and was wrongly exhibited and admitted in evidence by the lower Court, that the plaintiff had not pleaded readiness and willingness to execute his part of the contract and that the suit was barred by limitation not having been filed within three years from the death of Tyofil on 09.01.1999. On these grounds, the learned District Judge allowed the appeal and set aside the judgment and decree passed by the learned Civil Judge, Class-II, Jashpurnagar.

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6. Shri Kishore Bhaduri, learned counsel for the appellant/plaintiff has placed reliance on **Prithivi Raj Singh vs. Dalip Kulkarni and others**[1] in support of his contention that where the vendor had received the whole consideration on execution of the agreement to sell, there remained nothing to be performed on the part of the vendee, the absence of pleadings of readiness and willingness to perform his part of the contract were not fatal to the plaintiff's case. Reliance was also placed on **Shymlal Kumar Roy v. Sushil Kumar Agarwal**[2] in support of the contention that no objection, having been raised by the respondents/defendants at the time of admission of the document Ex.P.1 in evidence, Section 36 of the Indian Stamp Act, 1899, prohibits a Court of law from reopening a matter with regard to the sufficiency or otherwise of the stamp duty paid on such instrument.

7. On the other hand, Shri J.K.Shastri, learned counsel for the respondents/defendants argued in support of the judgment delivered by the learned Civil Judge, Class-II, Jashpurnagar and placed reliance on **Md. Mohar Ali v. Md. Mamud Ali and others**[3] contending that in the absence of specific pleadings of readiness and willingness of the plaintiff to perform his part of the contract, the plaintiff was not entitled to a decree for specific performance of contract, if any.

8. The following substantial questions of law arose for determination in this appeal:

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1. AIR 1999 Rajasthan 201
2. 2007 AIR SCW 234 = JT 2006 (9) SC 483
3. AIR 1998 Gauhati 92

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"1. Whether non-impounding of document Ex.P.1 invalidate it?

2. Where full consideration is paid at the time of agreement in those cases also absence of pleading and proof regarding readiness and willingness may create obstruction in grant of relief of specific performance?

3. Whether in the facts and circumstances of this case, the date of death of seller was the starting point for counting period of limitation?"

SUBSTANTIAL QUESTION NO.1

9. So far as the first question relating to non-impounding of document Ex.P.1 is concerned, the matter is well settled by a decision of the Apex Court in **Shyamlal** (supra 2) wherein it was held that if a document insufficiently stamped was exhibited and admitted in evidence without any objection having been raised by the opposite party, Section 36 of the Indian Stamp Act, 1899 gets attracted and the Court is prohibited from reopening the matter. In the present case, the *Ekrarnama* Ex.P.1 was exhibited and admitted in evidence by the learned Civil Judge Class-II, Jashpurnagar without any objection being raised by the appellants/defendants to the admissibility of the document on its being insufficiently stamped. Under such circumstances, Section 36 of the Indian Stamp Act, 1899 becomes operative. If a party to the lis intends that an instrument produced by the other party being insufficiently stamped should not be admitted in evidence, he must raise an objection thereto at the appropriate stage. He may not do so only at his peril. Since no objection was raised by the appellants/defendants with regard to the

admissibility of the document *Ekrarnama* Ex.P.1, they, at a later stage, cannot be permitted to turn round and contend that the said document is inadmissible in evidence. The appellants, having consented to the document being marked as an exhibit, have thus lost their right to reopen the question. The first question is therefore, answered that the First Appellate Court was not right in recording a finding that the document *Ekrarnama* Ex.P.1 being insufficiently stamped was wrongly exhibited and admitted in evidence by the lower Court. In the facts and circumstances, Section 36 of the Indian Act bars any such question relating to admissibility of the document on the ground of its being insufficiently stamped being called in question at any stage of same suit or proceeding once it has been exhibited and admitted in evidence without being opposed by the other party.

SUBSTANTIAL QUESTION NO.2

10. The pleadings of the plaintiff regarding the agreement by Tyofil Ekka are as vague as it could be. *Ekrarnama* Ex.P.1 shows that Tyofil Ekka had borrowed a sum of Rs.300/- for his personal work. The land mentioned in Ex.P.1 is only 25 decimals out of Kh.No.125. The consideration mentioned in agreement Ex.P.1 dated 10.09.1990 is Rs.300/- only. In his evidence, Paulus Tigga stated that Tyofil had received a further sum of Rs.585/- from him few years after executing the agreement, due to which, the consideration for the land became Rs.885/-. A document Ex.P.4 has also been filed which clearly goes to show that 4 years after executing the document Tyofil was regularly receiving some loan from Paulus Tigga. There is no mention of the document Ex.P.1 in the document Ex.P.4. Ex.P.4 clearly shows that the true nature of the document Ex.P.1 was a loan transaction

and not an agreement to sell. I fully agree with the finding recorded by the learned District Judge on proper appreciation of the evidence in paragraphs 11 to 15 of the judgment. The manner in which the area of land allegedly agreed by Tyofil to sell to Paulus Tigga increased from 0.25 acre to 0.48 acre also throws a cloud of suspicion over the plaintiff/respondent's case and completely disentitles him to a purely discretionary decree for specific performance of contract.

11. In the facts and circumstances of the case, as pleaded by the plaintiff, it was necessary for him to plead readiness and willingness to perform his part of the contract, if any. Testimony of Paulus Tigga in paragraph 9 goes to show that on Kh.No.125, total area 1.38 acres, Filmon, son of Tyofil Ekka had constructed a house and was in cultivating possession of the land. This completely demolishes the plaintiff's case that he was in possession of the suit lands. There is an admission in paragraph 7 by Paulus Tigga that the amounts paid by him to Tyofil Ekka were by way of loan. There is nothing on record to show that after getting the document Ex.P.1 executed from Tyofil Ekka on 10.09.1980, the plaintiff made any efforts to get the sale-deed executed from Tyofil Ekka during his life time. On the contrary, the evidence shows that he continued lending monies to Tyofil Ekka from time to time. It is only after the death of Tyofil Ekka and on mutation of the names of the defendants that the document Ex.P. 1 surfaced for the first time. The manner in which the area of the land and the consideration kept enhancing, it is not established that Tyofil Ekka had agreed to sell a clearly demarcated 25 decimals of land out of Kh.No.125 to the plaintiff Paulus Tigga on 10.09.1980 and had paid the entire consideration for the same. It was therefore necessary

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for the plaintiff to plead and establish by leading cogent evidence that he was, after 10.09.1980, always ready and willing and made efforts to get the sale deed executed from Tyofil Ekka during his life time. Absence of pleadings regarding readiness and willingness to get the sale deed executed or proof thereof clearly disentitles the plaintiff to a decree for specific performance. In this view of the matter, substantial question of law No.2 is answered accordingly. The finding recorded by the learned District Judge is thus impeccable.

SUBSTANTIAL QUESTION NO.3

12. First of all, the evidence led by the plaintiff does not establish that Tyofil Ekka had agreed to sell the suit land to him on 10.09.1980. The evidence and pleadings show that neither the consideration nor the area of land was certain. Under Article 54 of the Limitation Act 1963, the period of limitation for specific performance of contract is three years from the date fixed for the performance, or, if no such date is fixed when the plaintiff has notice that performance is refused. In this case, although in Ex.P.1 time was not the essence of the contract there is absolutely nothing on record to show that the plaintiff made any effort to get the sale deed executed from Tyofil Ekka during his life time. Admittedly, Tyofil died on 09.01.99. The suit was filed on 05.03.2003 after more than three years. In this view of the matter, the finding recorded by the First Appellate Court that even if the death of the seller Tyofil Ekka is to be taken as the starting point for counting period of limitation, the suit was clearly barred by limitation, cannot be faulted with. Substantial question No.3 is also answered accordingly.

13. Having answered the substantial questions of law in the manner as aforesaid, I am of the considered opinion that this appeal is devoid of merit and is accordingly dismissed. Entire costs of the appeal shall be borne by the appellant/plaintiff. Pleader's fee be allowed according to schedule, if certified. A decree be drawn accordingly.

Sd/-
Dilip Raosaheb Deshmukh
Judge